It was alleged that under the constitution of Minnesota, Mr. Shoemaker, after the felony conviction, had become ineligible to vote or hold any office. Nevertheless, it was pointed out that he had voted in the 1932 election, had run for federal office, and that the state could not disqualify him in the latter capacity.(18)

On Mar. 10, 1933, Mr. Paul J. Kvale, of Minnesota, offered an amendment in the nature of a substitute providing that the Speaker be authorized and directed to administer the oath to Mr. Shoemaker and that the question of his final right to a seat be referred to the Committee on Elections No. 2. Debate ensued as to the responsibility of the House to bar the Member-elect at the door before giving him a hearing, as some precedents of the House suggested, or to follow other precedents and administer the oath initially and then, at a later date, consider his final right to a seat.

At the conclusion of debate the amendment was adopted on a division vote, 230 to 75.(19) The resolution as amended was agreed to, and its preamble, which referred to charges against Mr. Shoemaker, was stricken by unanimous consent.(20)

18. *Id.* at p. 74.

19. *Id.* at pp. 132–139.

20. *Id.* at p. 139.

§ 15. Suspension of Privileges

At one time, the view was expressed by a select committee that the House may impose a punishment upon a Member, when appropriate, other than censure or expulsion. The select committee in the case of Adam Clayton Powell, of New York, stated:(21)

> Although rarely exercised, the power of a House to impose upon a Member punishment other than censure but short of expulsion seems established. There is little reason to believe that the framers of the Constitution, in empowering the Houses of Congress to "punish" Members for disorderly behavior and to "expel" (art. I, sec. 5, clause 2), intended to limit punishment to censure. Among the other types of punishment for disorderly behavior mentioned in the authorities are fine and suspension.
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> In the case of Senators Tillman and McLaurin in 1902, during the 57th Congress, the Senate specifically considered the question of punishment other than expulsion or censure. The case arose on February 22, 1903, and involved a heated altercation on the floor of the Senate in which the two men came to blows. The Senate went immediately into executive session and adopted an order declaring both Senators to be in contempt of the Senate

21. H. REPT. NO. 90–27, 90th Cong. 1st Sess., 1967, "In Re Adam Clayton Powell, Report of Select Committee Pursuant to H. Res. 1," pp. 28, 29.

and referring the matter to a committee. The President pro tempore ruled that neither Senator could be recognized while in contempt and subsequently directed the clerk to omit the names of McLaurin and Tillman from a rollcall vote on a pending bill. On February 28, the committee to which the matter had been referred recommended a resolution of censure, which the Senate adopted, stating that Tillman and McLaurin are "censured for the breach of the privileges and dignity of this body, and from and after the adoption of this resolution the order adjudging them in contempt of the Senate shall be no longer in force and effect" (2 Hinds, sec. 1665). "The penalty," according to "Senate Election, Expulsion and Censure Cases" (p. 96), "thus, was censure and suspension for 6 days—which had already elapsed since the assault."

In the committee report on the Tillman-McLaurin case, three of the 10 member majority submitted their views on the issue of suspension (2 Hinds, pp. 1141–1142):

> . . . The Senate has not like power with Parliament in punishing citizens for contempt, but it has like power with Parliament in punishing Senators for contempt or for any disorderly behavior or for certain like offenses. Like Parliament, it may imprison or expel a member for offenses. "The suspension of members from the service of the House is another form of punishment." (May's Parliamentary Practice, 53.) This author gives instances of suspension in the seventeenth century and shows the frequent suspension of members under a standing order of the House of Commons, passed February 23, 1880.
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> * * * * *
>
> The Senate may punish the Senators from South Carolina by fine, by reprimand, by imprisonment, by suspension by a majority vote, or by expulsion with the concurrence of two-thirds of its members.
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> The offense is well stated in the majority report. It is not grave enough to require expulsion. A reprimand would be too slight a punishment. The Senate by a yea and-nay vote has unanimously resolved that the said Senators are in contempt. A reprimand is in effect only a more formal reiteration of that vote. It is not sufficiently severe upon consideration of the facts.
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> A minority of four committee members, however, dissented "from so much of the report of the committee as asserts the power of the Senate to suspend a Senator and thus deprive a State- of its vote . . ." (p. 1141).

However, by its adoption of Rule XLIII clause 10[22] in the 94th Congress, relating to the voluntary abstention from voting and from participating in other legislative business by Members who have been convicted of certain crimes, the House indicated its more recent view that a Member could not be deprived involuntarily of his right to vote in the House. The constitutional impediments to such deprivation were discussed in the debate on the proposed change in the rule.[23]

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22. See House Rules and Manual § 939 (1977) .

23. 23. For discussion of the debate and adoption of the rule, see § 15.1, infra.

Grounds; Duration of Suspension

§ 15.1 In the 94th Congress, Rule XLIII was amended to provide that a Member convicted of certain crimes "should refrain from participation in the business of each committee of which he is a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House.. . ." The conviction must be by a court of record and the crime must be one for which a sentence of two or more years' imprisonment may be imposed. The period of abstention continues until the Member is subsequently reelected or until juridical or executive proceedings result in the "reinstatement of the presumption of his innocence." (1)

It is clear from the debate on House Resolution 46,(2) which added clause 10, to Rule XLIII that the amendment was drafted to safeguard the reputation of the House and at the same time preserve the right to representation of the constituents of the Member's district.(3) Several of the proponents of the resolution emphasized the voluntary nature of compliance with the rule:

> MR. [JOHN J.] FLYNT [Jr., of Georgia]: . . . Let me emphasize that there is nothing mandatory or compulsory in this resolution, nor is there any specific enforcement authority. However, a Member who ignored the stated policy of the House would do so at the risk of subjecting himself to disciplinary procedures provided under House rules. . . .
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> MR. [MELVIN] PRICE [of Illinois]: . . . Let me point out that there is nothing mandatory about the procedure recommended, but it would be expected that any Member affected would abide by the spirit of the policy. The policy could be waived by the House in specific cases if it deemed such a waiver would be in the public interest.

The reason for the voluntary nature of the Member's abstention was also made clear:

> MR. [ROBERT C.] ECKHARDT [of Texas]: Mr. Speaker, it would seem to me that to deprive a person mandatorily of his right to vote and participate on the committee would be tantamount to making him stand aside altogether in his function as a Congressman and would go to the question of his qualifications to serve. As I understand, the Powell case said that may only be for one of three reasons:

1. Rule XLIII clause 10, *House Rules and Manual* § 939 (1977).

2. H. Res. 46, 94th Cong. 1st Sess. (1975).

3. 121 CONG. REC. 10339–45, 94th Cong. 1st Sess., Apr. 16, 1975.

The question of age, the question of citizenship, and the question of residency within the State from which a man comes.

So the only way that there could be a mandatory exclusion from the exercise of the right of any Congressman to represent his district, it would seem to me, would be on a two-thirds vote on expulsion. Would the gentleman agree?

MR. FLYNT: Mr. Speaker, the gentleman from Texas is correct.

The committee felt—and I believe that the committee was unanimous—that to have attempted to make this mandatory would have been unconstitutional. It would have deprived the district, which the Member was elected to represent, of representation, as well as invoking a sanction upon the Member himself. . . .

MR. ECKHARDT: Mr. Speaker, I may say, to a certain extent practically, one may be depriving his district of representation when one tells him that he shall only participate at his peril on grounds of certain further action, which I suppose might include expulsion.

The constitutionality of depriving a Member's constituents of their representative vote troubled several Members:

MR. [DON] EDWARDS [of California]: . . . The measure before us punishes a Member of the House by attempting to deprive that person of the right to vote and participate in the legislative process. However, in our effort to so discipline a Member of Congress, we would effectively disenfranchise the nearly one-half million Americans who elected that person to represent them. Such an action undermines the basic interest of a constituency in their representative government. Any constituency has a legitimate interest in being represented by its preferred choice who possesses all the constitutional eligibility requirements, even though objected to on other grounds, such as his unwillingness to support existing laws.

A resolution such as this could put the House in the position of encouraging the loss of representation to a constituency whose representative may have committed an act of civil disobedience as a matter of conscience, perhaps even with the approval of that constituency.

The Constitution has already provided this body with the remedy of expelling a Member for misconduct. Under that clause, the expelled Member may be immediately replaced by another person to represent the constituency. However, under the provisions of the measure before us, there can be no replacement for the punished Member. By the terms of the resolution a constituency would be left without a voice in the House of Representatives for the duration of the Congress or until the disciplined Member was acquitted.

I feel that the problems raised by this measure go to the heart of our form of government. One of the most fundamental principles of this representative democracy is, in the words of Alexander Hamilton, "that the people should choose whom they please to govern them."

The argument was also advanced that the amendment exceeded the powers of the House:

MR. [ROBERT F.] DRINAN [of Massachusetts]: Mr. Speaker, on November

14, 1973, this House debated and passed a resolution nearly identical to the one now before us. It expressed the sense of this body that Members convicted of a crime punishable by more than 2 years in prison should refrain from participating in committee business and from voting on the floor.

On that occasion, I strongly opposed the resolution because, in my judgment, it exceeded the powers of the House. The Constitution is quite plain on the matter of disciplining Members. Article I, section 5, clause 2 provides:

> Each House may . . . punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

That provision marks the limits of permissible action; no other sanction against an elected Representative is allowed. The resolution we debate today intrudes into the prohibited sphere.

Under the Constitution, the House may discipline its Members only for disorderly behavior. The sanction of expulsion, while authorized, is reserved for outrageous conduct which effectively disrupts the orderly workings of the legislative process, in short, a serious violation of the Member's oath of office.

It seems to me that an elected Representative is entitled to the full privileges of the House, unless suspended or expelled. There is no middle ground. We cannot have two classes of Members: one with all the rights, and the other with only partial powers. Such bifurcation in our body is at variance with the constitutional scheme which guides our actions. Yet that is what this resolution, if passed, would accomplish.

Several other issues were raised during the debate. In response to a question concerning the omission of the effect of guilty pleas, Mr. Flynt, who had introduced the resolution, stated that a guilty plea was identical to a conviction, which was the term employed in the resolution. Similarly, Mr. Phillip Burton, of California, expressed concern as to whether an indeterminate sentence might result in House sanctions. Again, Mr. Flynt responded that it was a purpose of the Committee on Standards of Official Conduct to have these sanctions "triggered by a conviction on a count in an indictment which amounted to a felony."

Mr. Flynt further clarified several anticipated consequences of the adoption of the amendment:

> During the period of nonvoting, the Member would not be barred from attending sessions of the House or from carrying on normal representational activities, other than voting. His salary and other benefits would continue. . . .
>
> As the report points out, the committee does not intend to deprive a Member of his right to attend sessions of the House or committees or to preclude him from recording himself "present" on a yea-and-nay vote or from responding to a quorum call. A Member thus could protect his attendance record without affecting the outcome of the vote.
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> However, I do feel that a Member affected by the rule should not be a

party to a live pair, since such a pair could affect the outcome by offsetting the vote of the individual with whom he is paired.

The House could at any time waive application of the resolution as to specific legislation or issues, thereby restoring the Member's full voting rights in such instances without violating the spirit of the rule.

§ 15.2 The House, in the 93d Congress, adopted a resolution expressing the sense of the House that Members convicted of certain crimes should refrain from participation in committee business and from voting in the House until the presumption of innocence is reinstated or until re-elected to the House.

On Nov. 14, 1973,[4] the House agreed to the following resolution:

Resolved, That it is the sense of the House of Representatives that any Member of, Delegate to, or Resident Commissioner in, the House of Representatives who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is then a member and should refrain from voting on any question at a meeting of the House, or of the Committee of the Whole House, unless or until judicial or executive proceedings result in reinstatement of the presumption of his innocence or until he is re-elected to the House after the date of such conviction. This resolution shall not affect any other authority of the House with respect to the behavior and conduct of its Members.

In its report on the resolution, the Committee on Standards of Official Conduct, stated, in part, at page 2:[5]

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4. 119 CONG. REC. 36946, 93d Cong. 1st Sess. [H. Res. 700, providing for consideration of H. Res. 128], H. REPT. NO. 93–616, Committee on Standards of Official Conduct.

Parliamentarian's Note: A similar resolution (H. Res. 933, 92d Cong.) had been reported in the preceding Congress but had not been called up by the House. That resolution had been prompted by the conviction of former Representative Dowdy for receiving a bribe, but when he voluntarily agreed not to participate in House or committee proceedings, the resolution was not called up in the House. Such resolutions are not privileged under Rule XI clause 22, as they do not recommend action by the House with respect to an individual Member.

5. H. REPT. NO. 93–616, 93d Cong. 1st Sess., Oct. 31, 1973.

Parliamentarian's Note: In the debate on the resolution the question was raised that even though it was a sense-of-the-House resolution, would it, if followed in a specific case, deprive the voters in the Member's district of a constitutional right to be fully represented? (See the remarks of Representative Robert F. Drinan [Mass.], 119 CONG. REC. 36945, 93d Cong. 1st Sess.) For an opposite point of view see, Luther Stearns

To the question of when to act, the committee adopted a policy which essentially is: where an allegation is that one has abused his direct representational or legislative position—or his "official conduct"—the committee concerns itself forthwith, because there is no other immediate avenue of remedy. But where an allegation involves a possible violation of statutory law, and the committee is assured that the charges are known to and are being expeditiously acted upon by the appropriate authorities, the policy has been to defer action until the judicial proceedings have run their course. This is not to say the committee abandons concern in statutory matters—rather, it feels it normally should not undertake duplicative investigations pending judicial resolution of such cases.

The implementation of this policy has shown, through experience, only one need for revision. For the House to withhold any action whatever until ultimate disposition of a judicial proceeding, could mean, in effect, the barring of any legislative branch action, since the appeals processes often do, or can be made to, extend over a period greater than the 2-year term of the Member.

Since Members of Congress are not subject to recall and in the absence of any other means of dealing with such cases short of reprimand, or censure, or expulsion (which would be totally inappropriate until final judicial resolution of the case), public opinion could well interpret inaction as indifference on the part of the House.

The committee recognizes a very distinguishable link in the chain of due process—that is the point at which the defendant no longer has claim to the presumption of innocence. This point is reached in a criminal prosecution upon conviction by judge or jury. It is to this condition and only to this condition that the proposed resolution reaches.

The committee reasons that the preservation of public confidence in the legislative process demands that notice be taken of situations of this type.

Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America,* 2d ed. (1866) § 626. Cushing conceded that during suspension, the voters would be deprived of the service of their Representative, but contended that the rights of the voters would be no more infringed by this proceeding than by an exercise of the power to imprison.

Voluntary Withdrawal

§ 15.3 Following a conviction for bribery and related offenses, a Member refrained from voting on the floor or in committee and from participating in committee business.

Parliamentarian's Note: Representative John Dowdy, of Texas, was convicted under federal statutes of bribery, perjury, and conspiracy on Dec. 31, 1971, in a federal district court in Baltimore, Maryland. On Jan. 23, 1972, the court sentenced Mr. Dowdy to 18 months in prison and a fine of $25,000.

On June 21, 1972, Mr. Dowdy filed a letter with Speaker Carl

Albert, of Oklahoma, promising to refrain from voting on the floor or in committee and from participating in committee business pending an appeal of his conviction.(6)

§ 16. Censure; Reprimand

In the House, the underlying concept governing the censure of a Member for misconduct is that of breach of the rights and privileges of the House.(7) As indicated in a report of a select committee of the House,(8) the power of each House to censure its Members "for disorderly behavior" is found in article I section 5 clause 2 of the U.S. Constitution. It is discretionary in character, and upon a resolution for censure of a Member for misconduct each individual Member considering the matter is at liberty to act on his sound discretion and vote according to the dictates of his own judgment and conscience.

The conduct for which censure may be imposed is not limited to acts relating to the Member's official duties. See *In re Chapman* (166 U.S. 661 [1897]). The committee considering censure of Senator Joseph McCarthy stated (S. Rept. No. 2508, 83d Cong., p. 22): "It seems clear that if a Senator should be guilty of reprehensible conduct unconnected with his official duties and position, but which conduct brings the Senate into disrepute, the Senate has the power to censure."

During its history, through the 94th Congress, the House of Representatives has censured 17 Members and one Delegate and has reprimanded one Member in the 94th Congress. All but one of the instances of censure occurred during the 19th century, 13 Members being censured between 1864 and 1875. The last censure in the House was imposed in 1921. In the Senate, there are four instances of censure, including the censure of Senator Joseph McCarthy in 1954.

Most cases of censure have involved the use of unparliamentary language, assaults upon a Mem-

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6. See Congressional Quarterly Weekly Report, July 8, 1972, p. 1167.

See also 6 Cannon's Precedents §§ 402, 403, wherein a select committee assumed that a Member indicted under federal law would take no part whatever in any of the business of the House or its committees until final disposition of the case was made.

7. 2 Hinds' Precedents § 1644.

8. H. REPT. NO. 90–27, 90th Cong. 1st Sess., Feb. 23, 1967, "In Re Adam Clayton Powell, Report of the Select Committee Pursuant to H. Res. 1," pp. 24–30.